Majlis Agama Islam Selangor & Anor v Bank Muamalat Malaysia Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(MUA)(W)-702–12 OF 2018
MOHAMAD ZABIDIN, VAZEER ALAM AND MOHD SOFIAN JJCA
10 MAY 2021

Civil Procedure — Res judicata — Respondent claimed against appellants for recovery of monies based on payment guarantee agreement — Whether claim by respondent amounted to duplicity of proceedings

Contract — Construction of clause — Interpretation — Respondent claimed against appellants for recovery of monies based on payment guarantee agreement — Whether payment guarantee agreement extended to guaranteeing payment of entire facility agreements

This was an appeal by the appellants ('defendants') against the judgment of the High Court in allowing the respondent's ('plaintiff') claim. The second defendant ie Kolej Islam Antarabangsa Selangor Sdn Bhd ('KUIS') was allowed by the first defendant ie Majlis Agama Islam Selangor ('MAIS') to build a students' centre with accommodation on the latter's piece of land ('the development'). KUIS privatised the design, supply, construction, operation, maintenance and management of the accommodation and student centre to Redha Resources Sdn Bhd ('Redha'). A tripartite concession agreement was entered ('concession agreement') where Redha was granted a concession to carry out the development at its own costs and expenses. The concession agreement was based on a build-operate-transfer model with a concession period of 33 years during which time Redha was granted the right and authority, among others, to demand, collect and retain the agreed charges for students occupying the accommodation. To finance the development, Redha obtained financing via a combination of syndicated Islamic financing facilities from a consortium of three banks, including the plaintiff ('the banks'). Redha and the banks executed various Islamic financing facility agreements and instruments to secure the financing and repayment of the facilities by Redha ('the facility agreements'). As securities for the financing facilities: (a) Redha executed an assignment of the concession agreement ('the assignment of concession agreement') where the rental charges to be obtained by Redha from KUIS shall be paid to the plaintiff (in its capacity as the facility and security agent for the consortium banks) as repayment to settle the financing facilities together with all profits due; and (b) the defendants and Redha executed a payment guarantee agreement where the defendants guaranteed payment to

the plaintiff of the rental proceeds payable to Redha. Shortly thereafter, dispute arose between the parties. The defendants' complaint was that Redha had failed to obtain approval for the building plans and the certificate of completion and compliance ('CCC') for the development as provided in the concession agreement and considered the concession agreement terminated. The defendants removed Redha as concessionaire and took over the operations and management of the development. The defendants continued to occupy and use the development without making any payments to Redha or the banks. The defendants commenced legal action at the Shah Alam High Court ('Suit No 205') where the defendants sought, among others: (i) against Redha, the termination of the concession agreement on account of the breaches; and (ii) against the plaintiff, the termination of the payment guarantee agreement, in the event the concession agreement was terminated. Redha appealed whilst the defendants cross-appealed against the decision of the Shah Alam High Court. The Court of Appeal ordered that: (1) the defendants to pay Redha the market value of the development together with all rental payable to Redha for the duration of the concession period; and (2) these amounts payable by the defendants to Redha to be paid directly to the plaintiff as repayment towards the amounts outstanding under the facility agreements and as provided for under the payment guarantee agreement. The present claim was regarding the plaintiff's claim against the defendants for recovery of monies based on the payment guarantee agreement and was for the sum of RM326,669,571.59. The plaintiff's claim was allowed and hence this appeal by the defendants.

Held, allowing the appeal with costs:

(1) The reliance placed by the learned judicial commissioner ('JC') on the oral testimony of witnesses in the matter of interpretation of the contract between the parties did not accord with established legal principles. The conclusion reached by the JC that the payment guarantee agreement extended to guaranteeing payment of the entire facility agreements in untenable. Considering all the terms of the payment guarantee agreement and the concession agreement, it was quite clear that the guarantee was limited in scope only to monies payable by MAIS and KUIS to Redha under the concession agreement and could not be construed to extend to cover all the monies due and payable by Redha to the banks under the facility agreements. It was not the duty of the court to read into the contract terms that were patently not there and expand it such that the defendants were made liable as guarantors for the entire financing facilities granted by the banks when such a reading would amount to rewriting the contract between the parties (paras 27, 29, 31 & 34).

(2) The plaintiff had obtained the full benefit of the judgment of the Court of Appeal in Suit No 205 and its rights under the payment guarantee agreement had been subsumed. If the plaintiff were to succeed in this

claim it would amount to a double claim against the defendants and the plaintiff would be unjustly enriched. Hence, this claim by the plaintiff amounted to duplicity of proceedings (see para 35).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu ('defendan') terhadap keputusan Mahkamah Tinggi yang membenarkan tuntutan responden ('plaintif'). Defendan kedua iaitu Kolej Islam Antarabangsa Selangor Sdn Bhd ('KUIS') dibenarkan oleh defendan pertama iaitu Majlis Agama Islam Selangor ('MAIS') untuk membina pusat pelajar dengan tempat tinggal di tanah MAIS ('pembangunan'). KUIS menswastakan reka bentuk, bekalan, pembinaan, operasi, penyelenggaraan dan pengurusan tempat tinggal dan pusat pelajar kepada Redha Resources Sdn Bhd ('Redha'). Perjanjian konsesi tiga pihak dimeterai ('perjanjian konsesi') di mana Redha diberi konsesi untuk menjalankan pembangunan dengan kos dan perbelanjaannya sendiri. Perjanjian konsesi berdasarkan model bina-kendali-pindah dengan tempoh konsesi 33 tahun di mana waktu itu Redha diberi hak dan kuasa, antara lain, untuk menuntut, mengumpul dan memegang caj yang dipersetujui untuk pelajar yang menduduki tempat tinggal. Untuk membiayai pembangunan itu, Redha memperoleh pembiayaan melalui gabungan kemudahan pembiayaan Islam dari pada konsortium tiga bank, termasuk plaintif ('bank-bank'). Redha dan bank-bank melaksanakan berbagai perjanjian dan instrumen kemudahan pembiayaan Islam untuk menjamin pembiayaan dan pembayaran balik kemudahan oleh Redha ('perjanjian kemudahan'). Sebagai jaminan untuk kemudahan pembiayaan: (a) Redha melaksanakan penyerahan perjanjian konsesi ('penyerahan perjanjian konsesi') di mana caj sewa yang akan diperoleh oleh Redha daripada KUIS harus dibayar kepada plaintif (dalam kapasitinya sebagai kemudahan dan ejen jaminan untuk bank-bank konsortium) sebagai pembayaran balik untuk menyelesaikan kemudahan pembiayaan bersama dengan semua keuntungan yang perlu dibayar; dan (b) defendan dan Redha melaksanakan perjanjian jaminan pembayaran di mana defendan menjamin pembayaran kepada plaintif hasil sewa yang perlu dibayar kepada Redha. Tidak lama selepas itu, timbul perselisihan antara kedua-dua pihak. Aduan defendan adalah bahawa Redha gagal mendapatkan kelulusan untuk pelan bangunan dan perakuan penyiapan dan pematuhan ('CCC') untuk pembangunan seperti yang diperuntukkan dalam perjanjian konsesi dan menganggap perjanjian konsesi tersebut ditamatkan. Defendan membatalkan Redha sebagai pemegang konsesi dan mengambil alih operasi dan pengurusan pembangunan. Defendan terus menduduki dan menggunakan pembangunan tanpa membuat pembayaran kepada Redha atau bank. Defendan memulakan tindakan undang-undang di Mahkamah Tinggi Shah Alam ('Saman No 205') di mana defendan menuntut, antara lain: (i) terhadap Redha, penamatan perjanjian konsesi kerana pelanggaran; dan (ii) terhadap plaintif, penamatan perjanjian jaminan pembayaran, sekiranya perjanjian konsesi ditamatkan. Redha merayu manakala defendan membuat rayuan balas terhadap keputusan mahkamah

Tinggi Shah Alam. Mahkamah Rayuan memerintahkan agar: (1) defendan membayar Redha nilai pasaran pembangunan tersebut bersama dengan semua sewa yang perlu dibayar kepada Redha selama tempoh konsesi; dan (2) jumlah ini yang perlu dibayar oleh defendan kepada Redha untuk dibayar terus kepada plaintif sebagai pembayaran balik terhadap jumlah yang belum dijelaskan di bawah perjanjian kemudahan dan seperti yang diperuntukkan di bawah perjanjian jaminan pembayaran. Tuntutan ini adalah mengenai tuntutan plaintif terhadap defendan untuk mendapatkan wang berdasarkan perjanjian jaminan pembayaran dan untuk jumlah sebanyak RM326,669,571.59. Tuntutan plaintif dibenarkan dan oleh itu rayuan ini oleh defendan.

Diputuskan, membenarkan rayuan dengan kos:

(1) Kebergantungan yang diberikan oleh pesuruhjaya kehakiman ('PK') pada keterangan lisan saksi dalam perkara tafsiran kontrak antara pihak-pihak tidak sesuai dengan prinsip undang-undang yang ditetapkan. Kesimpulan yang dicapai oleh JC yang bijaksana bahawa perjanjian jaminan pembayaran diperluas untuk menjamin pembayaran seluruh perjanjian kemudahan tidak dapat dipertahankan. Dengan mempertimbangkan semua terma perjanjian jaminan pembayaran dan perjanjian konsesi, cukup jelas bahawa jaminan itu terbatas dalam skop hanya untuk wang yang harus dibayar oleh MAIS dan KUIS kepada Redha di bawah perjanjian konsesi dan tidak dapat ditafsirkan untuk diperluas untuk merangkumi semua wang yang terhutang dan perlu dibayar oleh Redha kepada bank-bank di bawah perjanjian kemudahan. Bukan tugas mahkamah untuk membaca terma kontrak yang tidak ada dan memperluasnya sehingga defendan dipertanggungjawabkan sebagai penjamin untuk seluruh kemudahan pembiayaan yang diberikan oleh bank-bank apabila pembacaan sedemikian sama dengan menulis semula kontrak antara pihak-pihak (lihat perenggan 27, 29, 31 & 34).

(2) Plaintif telah memperoleh kepentingan penuh daripada keputusan Mahkamah Rayuan dalam Saman No 205 dan hak-haknya berdasarkan perjanjian jaminan pembayaran telah dimasukkan. Sekiranya plaintif berjaya dalam tuntutan ini, ia akan menjadi tuntutan berganda terhadap defendan dan plaintif akan diperkaya secara tidak adil. Oleh itu, tuntutan ini oleh plaintif berjumlah dengan prosiding berganda (lihat perenggan 35).]

Cases referred to

Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals [2009] 6 MLJ 839; [2009] 6 CLJ 22, CA (refd)

Bank of Credit and Commerce International SA v Ali and others [2002] 1 AC 251, HL (refd)

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597; [2010] 1 CLJ 269, FC (refd)

A *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38; [2004] 3 CLJ 96, CA (refd)
Perkayuan OKS No 2 Sdn Bhd v Kelantan State Economic Development Corpn [1995] 1 CLJ 761, FC (refd)

B **Legislation referred to**

Religion of Islam (State of Selangor) Enactment 2003

Appeal from: Writ of Summons No WA-22M-67–04 of 2017 (High Court, Kuala Lumpur)

C

Mohd Radzi bin Yatiman (Nurul Muhaniza bt Hanafi and Nadia bt Ahmad Suhaidin with him) (Abu Zahar Syed Mohd Fuad & Partners) for the appellants.
Muhammad Adam Abdullah (Adlina Atikah Zainal Abidin with him) (Adam Abdullah & Mani) for the respondent.

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Vazeer Alam JCA:

INTRODUCTION

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[1] This is an appeal from the judgment of the High Court in Malaya at Kuala Lumpur. The plaintiff/respondent claimed against both defendants/appellants for recovery of monies allegedly due under a guarantee. After full trial, the plaintiff's claim was allowed by the High Court. Judgment
F was sealed for the plaintiff in terms of the relief prayed for in paras 28(a) to (f) of the amended statement of claim comprising several declaratory orders and a monetary judgment for the sum of RM326,669,571.59 as well as late payment damages and costs. The defendants appealed that decision, which we allowed
G with costs and set aside the judgment of the High Court for the reasons below.

BRIEF FACTS

[2] The first defendant, Majlis Agama Islam Selangor ('MAIS') is a statutory
H body established under the Administration of the Religion of Islam (State of Selangor) Enactment 2003.

[3] The second defendant, Kolej Islam Antarabangsa Selangor Sdn Bhd ('KUIS') is a company wholly owned by MAIS. KUIS operates an institute of
I higher learning.

[4] MAIS owns a piece of land in Kajang. As landowner, MAIS agreed to allow KUIS to build a students' centre with accommodation on that piece of land ('development'). The development comprises ten blocks of hostels and/or

apartments for students' occupation, as well as some retail and non-retail space ('students' centre'). A

[5] KUIS privatised the design, supply, construction, operation, maintenance and management of the Accommodation and Student Centre to a company called Redha Resources Sdn Bhd ('Redha'). Towards this, a tripartite concession agreement dated 7 March 2006 was entered into between MAIS, KUIS and Redha ('concession agreement'), wherein Redha was granted a concession to carry out the development on MAIS's land at Redha's own costs and expense. B C

[6] The concession agreement was based on a build-operate-transfer ('BOT') model with a concession period of 33 years during which time Redha was granted the right and authority, among others, to demand, collect and retain the agreed charges for students occupying the accommodation as stipulated in the concession agreement. Under the concession agreement KUIS guaranteed Redha that there will be 100% occupancy of the development. KUIS further agreed to pay accommodation charges to Redha on the basis of not less than 6,504 students. A supplemental agreement dated 25 July 2007 was subsequently executed by MAIS, KUIS and Redha ('supplemental agreement'). D E

[7] To finance the development, Redha obtained financing via a combination of Syndicated Islamic Financing Facilities from a consortium of three banks, namely, Bank Pembangunan Malaysia Bhd ('BPMB'), Bank Kerjasama Rakyat Malaysia Bhd ('Bank Rakyat'), and the plaintiff, Bank Mualamat Malaysia Bhd ('banks'). The total financing facility granted by the banks amounted to RM125,800,000. Redha and the banks executed various Islamic financing facility agreements and instruments to secure the financing and repayment of the facilities by Redha ('facility agreements'). F G

[8] The plaintiff was, in respect of the financing facilities and the facility agreements, appointed the lead arranger, facility agent and security agent for the banks. As facility agent, it was agreed that the plaintiff will receive all monies guaranteed, due and payable by Redha under the concession agreement and distribute them as repayment to the banks in proportion to their financing extended to Redha. H

[9] As security for the financing facilities, Redha executed an assignment of the concession agreement ('assignment of concession agreement') with the plaintiff as facility and security agent for the consortium Banks. Pursuant to the assignment of concession agreement, the rental charges to be obtained by Redha from KUIS under the concession agreement shall be paid to the plaintiff (in its capacity as the facility agent) as repayment to settle the financing I

facilities together with all profits due. Under the assignment of concession agreement Redha had agreed to assign all accommodation charges due under the concession to the plaintiff for a period of 21 years. Written notice of the assignment of concession agreement was given to KUIS, the receipt of which was acknowledged by KUIS.

[10] Additionally, as security for the financing provided, MAIS, KUIS and Redha executed a payment guarantee agreement with the plaintiff as facility and security agent, wherein MAIS and KUIS guaranteed payment to the plaintiff of the rental proceeds payable to Redha under the concession agreement.

[11] The development was completed and KUIS allowed its students to occupy the accommodation.

[12] Shortly thereafter, dispute arose between MAIS and KUIS on the one part, and Redha on the other. The defendants' complaint was that Redha had failed to obtain approval for the building plans as well as the certificate of completion and compliance ('CCC') for the development as provided in the concession agreement and considered the concession agreement terminated. On account of this alleged breaches of the concession agreement, the defendants removed Redha as concessionaire and took over the operations and management of the development. The defendants also stopped making payments to Redha under the concession agreement although KUIS continued to receive payments from those using the accommodation and other facilities in the development. This led to a situation where the defendants continued to occupy and use the development built by Redha and financed by the banks without making any payments to Redha or the banks.

[13] Sometime in April 2015, MAIS and KUIS commenced legal action against Redha and the plaintiff at the Shah Alam High Court vide Civil Suit No 22NCvC-205–04 of 2015 ('Suit No 205'). In Suit No 205, the defendants sought, among others, the following relief:

(a) against Redha, the termination of the concession agreement on account of the aforesaid breaches; and

(b) against the plaintiff, the termination of the payment guarantee agreement, in the event the concession agreement is terminated.

[14] The Shah Alam High Court delivered its judgment in Suit No 205 ('decision') and among others, declared that Redha had breached the concession agreement and consequently declared that the concession agreement and supplemental agreement were terminated. The High Court further ordered that MAIS and KUIS pay Redha the market value of the

development as assessed by the registrar of the court and such ascertained value be paid by MAIS and KUIS to the plaintiff. The High Court did not make any pronouncement on the validity of the payment guarantee agreement nor declare it terminated.

[15] Redha appealed against part of the decision in Suit No 205 to the Court of Appeal; whilst MAIS and KUIS cross-appealed stating that the assessment should be based on construction value and not market value of the development. The Court of Appeal allowed Redha's appeal and held that there was no fundamental breach of the concession agreement by Redha. The Court of Appeal ordered that MAIS and KUIS pay Redha the market value of the development as at the date of judgment together with all rental payable to Redha for the duration of the concession period (after deducting all payments that MAIS and KUIS had made to Redha to date, including the maintenance and operating costs). The Court of Appeal further ordered that these amounts payable by MAIS and KUIS to Redha be paid directly to the plaintiff herein, ostensibly as repayment towards the amounts outstanding under the facility agreements and as provided for under the payment guarantee agreement.

[16] The banks had prior to that judgment of the Court of Appeal, separately sued Redha and the three personal guarantors for breach of the facility agreements, particularly for failure to make repayment. The banks succeeded in their claim and sealed summary judgment at the Court of Appeal against Redha and the three personal guarantors for the sum of RM326,669,571.59, which was then outstanding.

THE PRESENT CLAIM

[17] The plaintiff's claim against MAIS and KUIS is based on the terms of the payment guarantee agreement and is for the same sum of RM326,669,571.59. The plaintiff's assert that under the payment guarantee agreement MAIS and KUIS had jointly and severally guaranteed the payment of the sums due under the facility agreements from Redha to the plaintiff.

[18] The plaintiff's claim against the defendants is premised on cl 7 of the payment guarantee agreement that reads:

> CONTINUING SECURITY
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> This Agreement shall not be considered as revocable or satisfied by any intermediate payment of any part of the monies owing and payable of any part of the monies owing and payable by KUIS but shall be a continuing guarantee and shall extend to cover any sum or sums of money which shall from time to time constitute the balance due from KUIS to the Concessionaire under the Concession Agreement until such time when the whole of the concession proceeds shall have been fully paid.

[19] MAIS and KUIS on the other hand argue that the payment guarantee agreement only guarantees payment by them of payments due under the concession agreement to Redha and not the entire financing facilities covered by the facility agreements.

[20] The defendants further contended that the guarantee given under the payment guarantee agreement is a conditional guarantee as it is subject to cl 2.1 of the same. The defendants also argued that a true construction of cl 7 of the payment guarantee agreement guarantees payment only of the sums of money which shall from time to time constitute the balance due from KUIS to the Redha under the concession agreement and does not extend to cover Redha's liability under the facility agreements.

[21] The defendants also raised the issue of res judicata and duplicity of proceedings on account of the Suit No 205 and the judgment of the Court of Appeal delivered in that case.

HIGH COURT DECISION

[22] The learned judicial commissioner framed two issues for determination and stated them as follows in the grounds of judgment:

> [22] The pertinent issues which need to be considered and determined may be broadly grouped as follows:
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> (a) whether the plaintiff has a cause of action against the defendants under the payment guarantee agreement and if the answer is in the affirmative, whether defendants are liable under the payment guarantee agreement to pay the sum RM326,669,571.59 to the plaintiff; and
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> (b) whether the plaintiff's claim is barred by the principle of res judicata and duplicity of proceedings

[23] Having done that the learned JC summarised the arguments of parties as follows in her grounds of judgment:

> [40] The plaintiff contends the term 'concession proceeds' must necessarily refer to the proceeds from the rental charges paid by the occupiers of the accommodation which is utilised to pay the principal sum and the profit under the financing facilities provided to Redha.
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> [41] Whereas the defendants' took the position the term 'concession proceeds' in cll 3 and 7 refers to the rental charges paid by the students for the duration commencing 20 February 2017 until 21 December 2017. Thus Redha (by extension the plaintiff) is only entitled to the said payment under the concession agreement. The significance of the dates — 20 February 2017 was the date when the CCC was issued and 21 December 2017 was the date when the concession agreement was declared void via the Shah Alam order. Clause 3 of the payment

guarantee agreement reads —

> Notwithstanding anything contained to the contrary, MAIS, KUIS and the Concessionaire agrees and acknowledge that this Agreement given by MAIS shall be irrevocable for the tenure of the Concessionaire's Facilities with the Financiers (whichever is the later) and that the Financiers are extending the Facilities to the Concessionaire on this basis.
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> MAIS, KUIS and the Concessionaire further agrees and acknowledge that the rights of the Security Agent to all concession proceeds shall subsist and continue to subsists notwithstanding the issue and/or service of a demand for payment of any monies intended to be hereby secured and shall be applicable both before and after judgment and notwithstanding that the relationship between the Security Agent, KUIS and the Concessionaire as the case may be shall have ceased for any reason or cause whatsoever.

[42] Based on clauses 3 and 7 of the payment guarantee agreement it is clear that the Plaintiff is entitled to 'concession proceeds' and this is not disputed by both parties. The issue which requires determination is the meaning of 'concession proceeds' and whether under the payment guarantee agreement the payment of such proceeds under the concession agreement is guaranteed by the Defendants. The said provisions may be summarised as follows —

(a) clause 3 —

(i) MAIS's agreement under the payment guarantee agreement is irrevocable for the tenure of the financing facilities granted by the plaintiff to Redha;

(ii) the Plaintiff grants the Financing Facilities to Redha on the basis as stated in para (i) above; and

(iii) the rights of the Plaintiff to all concession proceeds shall subsist and continue to subsists notwithstanding the relationship between the Plaintiff, KUIS and Redha (as the case may be) ceases for any reason or cause whatsoever.

(b) clause 7 —

(i) the payment guarantee agreement is not revocable or satisfied by reason of any intermediate payment of monies owing and payable by KUIS;

(ii) the payment guarantee agreement is a continuing guarantee; and

(iii) the payment guarantee agreement cover any sum or sums of money which constitute the balance due from KUIS to Redha under the concession agreement until the whole of the concession proceeds have been fully paid.

[24] The learned judicial commissioner then concluded as follows:

[43] *Having considered clauses 2, 3 and 7 of the payment guarantee agreement this court*

is of the view the Defendants' argument that the guarantee that is provided under the payment guarantee agreement only relate to the circumstances specified under clause 2 is not tenable. No doubt clause 2 relates to guarantee in respect of payment of value of Construction Works (for default during Construction Period) and payment of all monies due to Redha from KUIS (for default during Concession Period). However clause 7 is not confined to payment mentioned in clause 2.1 and 2.2. Instead it refers to 'monies owing and payable by KUIS and shall extend to cover any sum or sums of money which constitute the balance due from KUIS to the Concessionaire [Redha] under the concession agreement until such time when the whole of the concession proceeds shall have been fully paid'.

[44] If it is intended that the scope of the payment guarantee agreement covers only the payment by MAIS and / or KUIS in respect of the value of Construction Works referred to in clause 2 of the same (as contended by the Defendants), then clause 3 and clause 7 would have expressly stated so. However both clauses 3 and 7 refers to payment of the 'concession proceeds' and the parties, in particular MAIS and KUIS, agree that the Plaintiff has a right to the said concession proceeds even if the contractual relationship between the Plaintiff, KUIS and Redha ceased.

[45] *Thus the scope of the guarantee under the payment guarantee agreement relate to the following —*

(a) *payment under clause 2.1 and 2.2 by KUIS or MAIS to Redha;*

(b) *monies owing and payable by KUIS and money which constitute the balance due from KUIS to Redha under the concession agreement (clause 7); and*

(c) *concession proceeds to the Plaintiff (clauses 3 and 7).* (Emphasis added.)

[25] Hence, in so far as the plaintiff's claim was concerned, the learned JC quite correctly identified the all-important question to be answered was the meaning of 'concession proceeds' in the context of the payment guarantee agreement and the concession agreement. However, in answering that question the learned JC found that 'the scope of the payment guarantee agreement not only covers the payment guaranteed under cl 2 but also monies owing and payable by KUIS and money which constitute the balance due from KUIS to Redha under the concession agreement'. And accordingly concluded that:

[64] Premised on the provisions of the payment guarantee agreement and having regards to the surrounding facts in particular the contemporaneous conduct of the Defendants and the related documents thereto, this court is of the view the true substance of the payment guarantee agreement is for the guarantee of the concession proceeds by MAIS for the duration of the financing facilities. In the context of the payment guarantee agreement read with the concession agreement, the concession proceeds is the rental charges which is supposed to be collected from the 100% occupancy of the accommodation guaranteed by KUIS and to be utilised for the repayment of the financing facilities obtained by Redha to carry out and complete the development for the benefit of MAIS and KUIS. As such the defendants are liable to pay the concession proceeds and therefore estopped from denying their obligations under the payment guarantee agreement. Accordingly the concession

proceeds received and retained by the Defendants are held in trusts for the Plaintiff. A

[26] Now, if that is the conclusion of the learned JC, then the liability of the defendants under the payment guarantee agreement must be limited to the terms therein, and to the concession proceeds only. However, the learned JC expanded the liability of the defendants under the payment guarantee agreement and made a leap to include the repayment of the entire amounts owed by Redha to the plaintiffs under the facility agreements as the defendants' responsibility. B

[27] In so doing the learned JC seems to have taken into account the oral evidence of the witnesses as to the conduct of the parties prior to execution of the payment guarantee agreement, as well as the conduct of the defendants during negotiations to seek an amicable settlement after Redha's concession was terminated. Further, the learned JC had also placed reliance on the testimony of the solicitor who prepared the payment guarantee agreement, as to the intention of the parties. We find that the reliance placed by the learned JC on the oral testimony of witnesses in the matter of interpretation of the contract between the parties does not accord with established legal principles. C D E

[28] In matters of construction of contracts, this court had in *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38; [2004] 3 CLJ 96 held that:

> It would be noticed that we have in arriving at our aforesaid conclusion made no reference to the oral evidence led at the trial as to the meaning and interpretation of the contract between the parties. This is because *the construction of a contract is a question of law for determination by the court and not by witnesses through their oral evidence.* F
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> As Lord Diplock observed in *Bahamas International Trust Co Ltd v Threadgold* [1974] 1 WLR 1514: G
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> > In a case which turns, as this one does, *on the construction to be given to a written document, a court called on to construe the document in the absence of any claim to rectification, cannot be bound by any concession made by any of the parties as to what its language means.* That is so even in the court before which the concession is made; a fortiori in the court to which an appeal from the judgment of the court is brought. The reason is that *the construction of a written document is a question of law. It is for the judge to decide for himself what the law is, not to accept it from any or even all of the parties to the suit;* having so decided it is his duty to apply it to the facts of the case. He would be acting contrary to his judicial oath if he were to determine the case by applying what the parties conceived to be the law, if in his own opinion it were erroneous. H I
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> When it comes to the meaning of words, it does not matter whether they appear in a contract or written law, the result is the same. The point is illustrated by the judgment of Thompson J, (as he then was) in *Reynolds v Public Prosecutor* [1956]

MLJ 101 at p 103; [1956] 1 LNS 1:

> It may be that the learned President accepted the evidence of the various functionaries of the Police Department who gave evidence as to what they considered to be the meaning of the relevant Orders as conclusive. If so, I think he was wrong. Whatever may be the attitude of Government functionaries who have to deal with these Financial General Orders there is nothing sacrosanct about them. They were not brought down from Pisgah by any bureaucratic Moses. They are written words and like any other written words what they mean is a matter of construction. It is no concern of mine as a Judge what civil servants do among themselves. As far as a Judge is concerned, they can say that black is white and for the purposes of their own activities black is white. But when the criminal law and its sanctions are invoked and *any question of construction* is involved then that *is a question for the Court to decide* and not any Financial Assistant or even any Superintendent of Police who happens to be in charge of records.

So too here. *It matters not a jot to us what the plaintiff thought his entitlements under the contract with the defendant were. Neither does it matter to us what the defendant's witnesses thought of the way in which that contract ought to be interpreted. Their views are entirely irrelevant; as irrelevant as the views of the witnesses who gave their interpretation of the Financial Orders in Reynolds.*

In the instant case, the learned judge referred to the oral testimony and relied upon it for the interpretation of the agreements and circulars. That, in our view is clearly an inadmissible method of construction. ... (Emphasis added.)

[29] Similarly, in ascertaining the true intention of the parties, we have scrutinised the payment guarantee agreement by giving the words used their contextual natural and ordinary meaning taking into account the relationship between the parties and all relevant facts surrounding the transaction. In doing so we have not looked into the parties' subjective state of mind. See: *Perkayuan OKS No 2 Sdn Bhd v Kelantan State Economic Development Corpn* [1995] 1 CLJ 761 (FC); *Bank of Credit and Commerce International SA v Ali and others* [2002] 1 AC 251. In doing so, we find that the conclusion reached by the learned JC that the payment guarantee agreement extends to guaranteeing payment of the entire facility agreements in untenable.

[30] Clause 2.1(c) of the payment guarantee agreement clearly provides that:

> (c) MAIS hereby unconditionally and irrevocably agrees with and guarantees that in the event the Concession Agreement is terminated by KUIS in accordance with Clause 18.2.3 of the Concession Agreement and KUIS is unable to make payment, or is in default of payment, or fails to remedy such default of payment, of the value of the Construction Works to the Concessionaire within the specified time period, *MAIS shall pay direct to Security Agent all monies due to the Concessionaire from KUIS* within fourteen (14) days commencing from the expiry of the thirty (30) days period accorded to KUIS as specified in the aforementioned Clause 18.2.4 of the Concession Agreement.

In this regard, the learned JC quite correctly found that the scope of the guarantee under the payment guarantee agreement is limited to the following:

(a) payment by KUIS or MAIS to Redha under cll 2.1 and 2.2 of the concession agreement;

(b) monies owing and payable by KUIS under cl 4.6 of the concession agreement and money which constitute the balance due from KUIS to Redha under the concession agreement; and

(c) concession proceeds to the plaintiff.

[31] The monies payable by KUIS to Redha under cl 4.6 of the concession agreement are provided in the following terms:

> 4.6 *Payment*
>
> KUIS shall, for the duration of the Concession Period, pay to the Concessionaire:
>
> 4.6.1 the Charges specified under clause 4.1, on the basis of not less than 6,504 students —
>
> (i) for students with study loans, within 14 days from the start of the Academic Calendar or start of each semester in advance, as the case may be; and
>
> (ii) for students without study loans, 30 days before the start of the Academic Calendar or the start of each semester in advance;
>
> or shall be payable within fourteen (14) days from the date of receipt by KUIS of any payment for Charges and/or in any event within ninety (90) days from the start of Academic Calendar; and
>
> 4.6.2 the deposits imposed by the Concessionaire under clause 4.5 ot the commencement of each Academic Calendar or each Semester.
>
> 4.6.3 Notwithstanding with the period of ninety (90) days above, for students with study loans from Perbadanan Tabung Pendidikan Tinggi Negara ('PTPTN'), KUIS shall not be responsible to pay any advance payment and/or late payment interest (if any) to the Concessionaire in the event no remittance towards the Charges is made by the PTPTN to KUIS after such period of ninety days.

Further cl 7 of the payment guarantee agreement provides:

> 7. *CONTINUING SECURITY*
>
> This Agreement shall not be considered as revocable or satisfied by any intermediate payment of any part of the monies owing and payable by KUIS but shall be a continuing guarantee and shall *extend to cover any sum or sums of money which shall from time to time constitute the balance due from KUIS to the Concessionaire under the Concession Agreement until such time when the whole of the concession proceeds shall have been fully paid.*

Now, considering all these terms of payment guarantee agreement and the concession agreement, it is quite clear that the guarantee is limited in scope to monies payable by MAIS and KUIS to Redha under the concession agreement and cannot be construed to extend to cover all the monies due and payable by Redha to the banks under the facility agreements. Such a construction is clearly not supported by the terms of contract between the parties.

[32] If indeed the payment guarantee agreement were to cover repayment of the financing facilities granted by the banks, then it would have been explicitly stated as was the case for the designated shareholders/directors of Redha, namely, Sulaiman bin Hj Abdul Razak, Jamaliah bt Kamarudin and Mohd Rafi bin Ahmad, who stood as guarantors for the financing facilities. These three persons were specifically mentioned as the guarantors of Redha's repayment under the facility agreements and all of them had executed personal joint and several guarantees in favour of the banks. Now, if indeed MAIS and KUIS were required to guarantee repayment of the financing facilities granted by the banks to Redha, they would have been required to execute similar guarantees, albeit at a corporate level. In this regard it would be opportune to point out that the banks sued Redha and the three personal guarantors, and judgment was entered by this court against all of them for the entire sums outstanding and payable under the facility agreements amounting to RM326,669,571.59.

[33] The fact of the matter is that KUIS terminated the concession agreement and this court has in the earlier appeal relating to Suit No 205 found that that termination was wrongful. Accordingly, judgment was entered for Redha, where MAIS and KUIS were ordered to pay the market value of the Development together with all rental payments payable for the entire duration of the concession. These payments were ordered to be paid directly to the plaintiff as these were payments that arose from the wrongful termination of the concession agreement, and hence all payments that would have been due for the entire duration of the concession agreement, which had been assigned to the banks by Redha, would in turn be payable to the plaintiff as security agent. This judgment of the Court of Appeal in Suit No 205 was in keeping with the terms of the concession agreement, the assignment of the concession agreement and the payment guarantee agreement.

[34] It is well settled that the court should not rewrite the terms of a contract. See: *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269 (FC); *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839; [2009] 6 CLJ 22. Thus, it is not the duty of this court to read into the contract terms that are patently not there and expand it such that the defendants are made liable as guarantors for the entire financing facilities granted by the banks

to Redha when such a reading would amount to rewriting the contract between the parties.

[35] As to the second issue of res judicata and duplicity of proceedings, we find that having obtained the full benefit of the judgment of this court in the matter of the appeal from Suit 205, wherein this court had ordered payment by MAIS and KUIS to the plaintiff of all the charges due to Redha for the duration of the concession period under the concession agreement as well as the current market value of the development. The plaintiff's rights under the payment guarantee agreement have been subsumed in the judgment of the Court of Appeal in Suit No 205 and If the plaintiff were to succeed in this claim it would amount to a double claim against the defendants and the plaintiff would be unjustly enriched. Hence, we agree with the appellants/defendants that this claim by the plaintiff amounts to duplicity of proceedings.

[36] Wherefore, we unanimously allowed the appeal with costs and set aside the judgment of the High Court and substituted it with an order that the plaintiff/respondent's claim against defendants/appellants is dismissed. Costs was fixed at RM50,000 here and below subject to allocator.

Appeal allowed with costs.

Reported by Ahmad Ismail Illman Mohd Razali